IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 844 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

DITIYA BHALJI NAIK
Versus
STATE OF GUJARAT

Appearance:
MR GIRISH D BHATT for Appellants No. 1-2
MR KG SHETH, APP for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 09/05/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.C.PATEL)

1. The appellants Ditiya Bhalji Naik and Najru Nemjee Rathwa were the accused in Sessions Case No.53 of 1993 before the Additional Sessions Judge, Vadodara

camping at Chhota Udepur who, by his judgment and order dated 21st July, 1995, convicted the appellants of the offence under Section 302 of the I.P.C. and sentenced each of them to life imprisonment. The charge against them was that on 4th March, 1992 at about 6 o'clock in the evening, they shot arrows at Bashariya Versing Rathwa which wounded and killed him. They were charged with the offence under Section 302 read with Section 34 and Section 114 of the I.P.C.

2. The prosecution case which is to be found in the evidence of the eye-witness Bhaljibhai Versing Rathwa (P.W.2) is as follows. The deceased Bashariya was the younger brother of Bhaljibhai. They were engaged in farming at village Ghogadev. In all, they were five brothers. He and deceased Bashariya were living together with their father Versing. His three other brothers were living apart. They all lived in one Faliya.

3. According to him, on the date of the incident, they started for Chhota Udepur at 7 o'clock in the morning since they wanted to buy clothes. They went to Chhota Udepur and started back at about 4 o'clock in the afternoon. It was about 6 o'clock in the evening when they arrived near the sim of village Koli. Bashariya was walking ahead of him and he was following him. Just then, Ditiya Bhaljibhai, the accused no.1 and Najru Nemjee, accused no.2, each shot one arrow at his brother Bashariya. The dispute was about the cutting and taking away timber in the forest. One arrow struck Bashariya in the chest and the other arrow struck him in the side. They shot the arrows from a distance of about 50 feet. Bashariya told him to take him to the hospital. He, therefore, went home to call his other brothers and told them about the incident. His brother Rajlo and other people of the village came there. They all took Bashariya to the Government Hospital at Chhota Udepur. The accused ran away after shooting the arrows. While they were on the way to the hospital, Bashariya died near village Jamla. It was about 2 o'clock at night. The police came to the hospital. His complaint (Exh.17) was recorded in the hospital. Then they went to the scene of offence and showed it to the police. In cross-examination, he denied that he had stated in the complaint that they had left home to go to Chhota Udepur at 12 o'clock and not at 7 o'clock in the morning. He denied that he had not stated before the police that Bashariya was walking ahead of him. He admitted that he had not stated before the police that the arrow was shot from a distance of 50 feet and thereafter, he had stopped and Bashariya was telling him to take him to the hospital

and that he had gone home to call his other brothers. He denied that since he had not witnessed the incident, he had not stated in the complaint which arrow had wounded which part of the body. He also denied that when they came back to the scene of the incident, Bashariya had already died. He stated in cross-examination that when they started for the hospital, it was still light. He said that they had arrived at the hospital at 4 o'clock in the night and not at about 9 o'clock. It was also elicited in cross-examination that the Forest Department had engaged the accused to keep a watch in the forest and that, previously too, they had a quarrel with the accused about cutting wood. He denied that he had given the names of the accused on mere suspicion. It also came out in his cross-examination that he pulled out two arrows but the arrow-head of one arrow remained in the body which was taken out in the hospital. It was put to him that the incident had occurred at 10 o'clock at night and not at 6 o'clock in the evening.

4. The next witness is Rajlabhai Versingbhai Rathwa (P.W.3), another brother of the deceased. He said that he went to the place of the incident when Bhalji came to call him. Bhalji had told him that the accused had shot the arrows and Bashariya was lying there and he was to be taken to the hospital. Bhalji had also told him that Bashariya was still alive. He and his other brothers and people of the village went to the place of the incident. Bashariya was still alive and was asking for water. He had also given the names of the accused. He has also stated that it was the accused who had shot arrows at him. He accompanied the other people who took Bashariya to hospital. Bashariya died near village Jamla on the way to the hospital. He denied that Bashariya had not given the names of the accused to him and that he had already died when they reached the place of the incident and that he was giving false evidence because of enmity. It has to be noted that nothing has been brought out in his cross-examination to shake his version that Bashariya was still alive when they went to the place of the offence and that Bashariya had disclosed the names of the accused to him.

5. The next witness was Manjibhai Chhitubhai Naik. According to the prosecution, the accused went to him after the incident and told him that while they were keeping a watch in the forest, Bashariya and his brother Bhalji had met them and that there was an altercation about cutting of wood in the forest and since they became angry, they had shot arrows at Bashariya which had wounded him. However, the witness did not support the

prosecution and was declared hostile.

6. The evidence of K.H. Parmar (P.W.8) shows that he was on duty as P.S.I. at Rangpur Police Station on 5th March, 1992. He had received a Vardhi from Chhota Udepur Police Station and he recorded the complaint at the Government Hospital at Chhota Udepur and registered the offence and carried out the investigation. There is nothing in his evidence which would help the defence.

7. Dr. Naliniben Jashraj Aahya (P.W.1) carried out the post-mortem on the body of deceased Bashariya Versing. The dead body was brought for post-mortem examination at 10 o'clock on 5th March, 1992 to the Community Health Centre, Chhota Udepur. She started the post-mortem examination at 10.30 in the morning and completed it at 11.30. The post-mortem note is at Exh.15. According to her, there was one penetrating wound 1" x 1/2" x cavity deep 1" below Left nipple. There was another penetrating wound 1" x 1/2" x cavity deep over lateral part of right hypochondrium and there was one incised wound 1" x 1/2" x skin deep in the middle of neck right side. According to her, there were three internal injuries, one was incised wound over left pleura 1" x 1/2" and one litre of blood was present in the left pleural cavity. There were also two incised wounds over lower part of left lung lateral to interior surface and the right lung was congested. There were also internal injuries in the abdomen and on the liver. She said that death had occurred due to shock following injury to left lung and intra-thoracic haemorrhage and injury to liver, stomach and intra-abdominal haemorrhage. She also said that the arrow which was shown to her had been found in the body during the post-mortem. According to her, the internal injuries were sufficient in the ordinary course of nature to cause death. In cross-examination, she said that in her post-mortem report she had stated that the death must have occurred between 6 to 12 hours before the post-mortem and hence, the time of death can be placed between 10.00 p.m. to 2.00 p.m. at night. She also said that such injuries could have been caused by an arrow shot from a distance of 200 feet. The injuries were such as could have caused the death immediately.

8. In their further statement under Section 313 of the Cr.P.C., the accused said that a false case had been brought up against them. Thus, the defence was one of denial.

9. The learned counsel for the appellants submitted that the medical evidence shows that the death must have

occurred between 10.00 p.m. to 2.00 p.m. at night and that nobody could have identified the assailants during darkness. However, the evidence of Bhalji is very clear that the incident occurred at 6 o'clock in the evening and according to him, Bashariya died at about 2 o'clock on the way to the hospital. We do not think that any hypothetical medical opinion can falsify the version of the eye-witness which has remained unshaken in the cross-examination. Bhaljibhai's brother Rajlabhai also has corroborated Bhaljibhai's evidence that the incident had occurred at about 6 o'clock in the evening and his evidence too has remained unshaken in the cross-examination. It was submitted on behalf of the appellants that according to Bhaljibhai, the arrows were shot from a distance of 50 feet and he could not have identified the assailants from such a distance. However, the incident occurred at 6 o'clock and we see no reason to disbelieve his evidence that he had seen the assailants.

10. Thus, the prosecution evidence which has been outlined and discussed above and which, according to us, is consistent, reliable and trustworthy, clearly shows that Bashariya died because of arrows which wounded him and that it was the two accused who had shot the arrows. The injuries were sufficient in the ordinary course of nature to cause death. In the circumstances, there is no escape from the conclusion that the accused had killed Bashariya by shooting arrows at him and they were guilty of the offence under Section 302. The learned Additional Sessions Judge had rightly convicted them of the said offence. We see no substance in the appeal and the same is dismissed.

(M.C. Patel, J.)

(A.L. Dave, J.)

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